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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 ANTONIO MENDOZA,
12 Petitioner,
13 v.
14 FRANCISCO J. QUINTANA, Warden,
15 Respondent.
16
17

Case No. EDCV 19-0106 JLS (SS)

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

18 This Report and Recommendation is submitted to the Honorable
19 Josephine L. Staton, United States District Judge, pursuant to 28
20 U.S.C. § 636 and General Order 05-07 of the United States District
21 Court for the Central District of California.
22

23 **I.**

24 **INTRODUCTION**
25

26 On January 9, 2019, Petitioner Antonio Mendoza ("Petitioner"),
27 a federal prisoner located at Federal Correctional Institution in
28 Victorville, California, proceeding pro se, filed a Petition for

1 Writ Of Habeas Corpus under 28 U.S.C. § 2241, ("Petition," Dkt.
2 No. 1), along with a supporting Memorandum. ("Petition Mem.," Dkt.
3 No. 2).¹ The Petition purports to challenge Petitioner's 2008
4 conviction and sentence in the Southern District of Indiana. (Id.
5 at 2). On February 20, 2019, Respondent filed a Motion to Dismiss
6 the Petition, along with a supporting Memorandum. ("Motion to
7 Dismiss," Dkt. No. 6). Respondent contends that the Petition is
8 actually a disguised, successive 28 U.S.C. § 2255 motion that this
9 Court lacks jurisdiction to consider. (Id. at 5-14). On April
10 11, 2019, Petitioner filed an opposition to the Motion to Dismiss.
11 ("Opposition," Dkt. No. 10).

12
13 For the reasons discussed below, the Petition must be
14 construed as a motion under § 2255. Therefore, Petitioner's claim
15 can be considered only by the sentencing court, i.e., the Southern
16 District of Indiana. However, transfer is inappropriate because
17 the Petition, construed as a § 2255 motion, is untimely and
18 successive. Accordingly, the Court recommends that Respondent's
19
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22 ¹ Under the "mailbox rule," a pleading filed by a pro se prisoner
23 is deemed filed on date the prisoner delivers it to prison
24 authorities for mailing. Houston v. Lack, 487 U.S. 266, 270 (1988).
25 Here, the Petition lacks a proof of service. However, Petitioner
26 appears to have signed the Petition on January 9, 2019. (Petition
27 at 9). Therefore, the Court will deem the Petition filed on that
28 date. See Butler v. Long, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014)
("We assume that [petitioner] turned his petition over to prison
authorities on the same day he signed it and apply the mailbox
rule."). (Citations to the Petition refer to the pages assigned
by the Court's electronic case filing system.)

1 Motion to Dismiss be GRANTED, the Petition be DENIED, and this
2 action be DISMISSED without prejudice for lack of jurisdiction.

3 4 II.

5 PRIOR PROCEEDINGS

6
7 On July 2, 2008, a jury in the Southern District of Indiana
8 convicted Petitioner of conspiracy to possess and distribute
9 methamphetamine and possession with intent to distribute. United
10 States v. Mendoza, No. CR 04-0155 (S.D. Ind.); see also Mendoza v.
11 United States, 2013 WL 3895231, at *5 (S.D. Ind. July 26, 2013).²
12 The Court sentenced Petitioner to life imprisonment, which was "the
13 mandatory minimum sentence given the quantity of drugs and
14 [Petitioner's] prior felony convictions." United States v.
15 Mendoza, 346 F. App'x 112, 114 (7th Cir. 2009). The Seventh Circuit
16 dismissed Petitioner's direct appeal on October 6, 2009. Id. at
17 116-17.

18
19 On January 3, 2011, Petitioner filed a motion pursuant to 18
20 U.S.C. § 2255. See Mendoza v. United States, No. CV 11-018, Dkt.
21 No. 1 (S.D. Ind.). On July 29, 2013, the Southern District of
22 Indiana denied Petitioner's § 2255 motion. See id., Dkt. No. 8;

23 ² The Court takes judicial notice of Petitioner's prior
24 proceedings in the Seventh Circuit. See In re Korean Air Lines
25 Co., Ltd., 642 F.3d 685, 689 n.1 (9th Cir. 2011) (a court may take
26 judicial notice of a court's own records in other cases and the
27 records of other courts); see also United States ex rel. Robinson
28 Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th
Cir. 1992) ("[Courts] may take notice of proceedings in other
courts, both within and without the federal judicial system, if
those proceedings have a direct relation to matters at issue.").

1 see also 2013 WL 3895231, at *5. On appeal, the Seventh Circuit
2 found no showing of the denial of a constitutional right and denied
3 Petitioner's request for a certificate of appealability. Mendoza
4 v. United States, No. 13-2769, Dkt. No. 14 (7th Cir. Dec. 19,
5 2013). On March 13, 2014, Petitioner filed a "motion for
6 reconsideration" in the Southern District of Indiana pursuant to
7 Federal Rule of Civil Procedure 60(b), which the district court
8 construed as another § 2255 motion. Mendoza v. United States, No.
9 CV 14-0701, Dkt. No. 2 (S.D. Ind.). The court denied the motion
10 as successive on May 9, 2014. Id., Dkt. No. 3. The Seventh Circuit
11 subsequently dismissed Petitioner's appeal for failure to pay the
12 required fees. Mendoza v. United States, No. 14-2143, Dkt. No. 3
13 (7th Cir. July 30, 2014).

14
15 On January 5, 2015, Petitioner filed a motion in his criminal
16 case to reduce his sentence pursuant to 18 U.S.C. 3582(c)(2) and
17 Amendment 782. Mendoza, No. CR 04-0155, Dkt. No. 2 (S.D. Ind.).
18 On July 23, 2015, he filed another § 2255 motion in the same case,
19 which the district court denied as successive on August 3, 2015.
20 Id., Dkt. Nos. 13-14. On May 12, 2016, the district court denied
21 Petitioner's motion to reduce his sentence pursuant to 18 U.S.C.
22 3582(c)(2) and Amendment 782. Id., Dkt. No. 28.

23
24 On August 6, 2017, Petitioner filed a habeas petition in this
25 Court, purportedly pursuant to 28 U.S.C. § 2241. (Mendoza v.
26 Entzel, CV 17-6010 JLS (SS), Dkt. No. 1 (C.D. Cal.)). The Court
27 construed the petition as a disguised § 2255 motion that it lacked
28 jurisdiction to review. (Id., Dkt. No. 6 at 4-9). The Court

1 further determined that transfer to the sentencing court was
2 inappropriate because the petition was untimely and successive.
3 (Id. at 9-12). Thus, on June 8, 2018, the Court denied the petition
4 and dismissed the action without prejudice. (Id., Dkt. Nos. 6, 8-
5 9). The instant Petition followed on January 9, 2019. (Dkt. No.
6 1).

8 III.

9 PETITIONER'S CLAIMS

10
11 Petitioner claims that, pursuant to the Fourth Circuit's
12 decision in United States v. Simmons, 649 F.3d 237 (4th Cir. 2011),
13 (1) his sentencing enhancement for prior convictions under 21
14 U.S.C. § 851 is "null and void," and (2) his prior convictions do
15 not qualify him as a career offender under the federal Sentencing
16 Guidelines. (Petition Mem. at 2, 10-17).

18 IV.

19 DISCUSSION

21 A. This Court Lacks Jurisdiction Because the Petition Must Be 22 Construed as a § 2255 Motion, Which Must Be Heard in the 23 Sentencing Court

24
25 "Federal courts are always under an independent obligation to
26 examine their own jurisdiction, and a federal court may not
27 entertain an action over which it has no jurisdiction." Hernandez
28 v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000) (per curiam)

1 (internal quotation marks and citation omitted). "[T]o determine
2 whether jurisdiction is proper, [the Court] must first determine
3 whether a habeas petition is filed pursuant to § 2241 or § 2255
4 before proceeding to any other issue." Id. "[A] habeas petition
5 filed pursuant to § 2241 must be heard in the custodial court,"
6 which in this case in the Central District of California. Id.
7 However, if a petition falls under § 2255, it must be brought
8 before the sentencing court, which in this case is the Southern
9 District of Indiana. See id.

10
11 "In general, § 2255 provides the exclusive procedural
12 mechanism by which a federal prisoner may test the legality of
13 detention." Loretsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000).
14 "Section 2255 allows a federal prisoner claiming that his sentence
15 was imposed 'in violation of the Constitution or laws of the United
16 States' to 'move the court which imposed the sentence to vacate,
17 set aside or correct the sentence.'" Harrison v. Ollison, 519 F.3d
18 952, 955 (9th Cir. 2008) (quoting 28 U.S.C. § 2255(a)).

19
20 "Under the savings clause of § 2255, however, a federal
21 prisoner may file a habeas corpus petition pursuant to § 2241 to
22 contest the legality of a sentence where his remedy under § 2255
23 is inadequate or ineffective to test the legality of his
24 detention." Hernandez, 204 F.3d at 864-65 (internal quotation
25 marks omitted); see also 28 U.S.C. § 2255(e) (an application for a
26 writ of habeas corpus by a prisoner in federal custody must be
27 presented to the sentencing court as a motion under § 2255 "unless
28 it also appears that the remedy by motion is inadequate or

1 ineffective to test the legality of his detention"). A remedy
2 qualifies as inadequate or ineffective for purposes of § 2255's
3 "escape hatch" only "when a petitioner (1) makes a claim of actual
4 innocence, and (2) has not had an unobstructed procedural shot at
5 presenting that claim." Harrison, 519 F.3d at 959. For a "claim
6 to be a legitimate § 2241 petition," both requirements must be
7 satisfied. Muth v. Fondren, 676 F.3d 815, 819 (9th Cir. 2012).

8
9 **1. The Petition Does Not State an Actual Innocence Claim**

10
11 "In this circuit, a claim of actual innocence for purposes of
12 the escape hatch of § 2255 is tested by the standard articulated
13 by the Supreme Court in Bousley v. United States, 523 U.S. 614,
14 623 (1998): To establish actual innocence, petitioner must
15 demonstrate that, in light of all the evidence, it is more likely
16 than not that no reasonable juror would have convicted him. Actual
17 innocence means factual innocence, not mere legal insufficiency."
18 Muth, 676 F.3d at 819 (internal quotation marks, parallel citations
19 and brackets omitted); see also Stephens v. Herrera, 464 F.3d 895,
20 898 (9th Cir. 2006) (a claim of actual innocence for purposes of
21 the § 2255 escape hatch is tested under the Bousley standard). The
22 mere assertion that a petitioner is actually innocent, without the
23 introduction of "evidence tending to show that he did not commit
24 the [acts] underlying his convictions," is insufficient to satisfy
25 the standard. See Marrero v. Ives, 682 F.3d 1190, 1192 (9th Cir.
26 2012). In addition, a petitioner may state a claim of actual
27 innocence "when he was convicted for conduct not prohibited by
28 law." Alaimalo v. United States, 645 F.3d 1042, 1047 (9th Cir.

2011) (petitioner was “actually innocent” of violating 21 U.S.C. § 952(a) where intervening en banc decision that overturned circuit precedent determined that transporting drugs between two locations under United States jurisdiction did not constitute “importation” with the meaning of the statute, even if the drugs were transported over or through international waters); see also United States v. Avery, 719 F.3d 1080, 1085 (9th Cir. 2013) (petitioner was actually innocent of crime of honest services fraud where intervening Supreme Court decision clarified that the crime to which he “pled guilty and for which he stands incarcerated is no longer a criminal offense”).

Unlike the petitioners in Alaimalo and Avery, who challenged the validity of their convictions, Petitioner does not argue that he is actually innocent of the crimes to which he pled guilty and for which he is currently incarcerated, nor does he argue that he is actually innocent of the underlying offenses used to enhance his sentence. Rather, Petitioner argues that those prior convictions do not properly qualify him for a sentencing enhancement under 21 U.S.C. § 851 and the federal Sentencing Guidelines. (Petition Mem. at 2, 10-17). Thus, the Petition present only a legal challenge to the way his sentence was calculated, not a factual showing that the petitioner did not commit the underlying offense. To make a claim of actual innocence, a petitioner must show that he is factually innocent, not merely that his conviction was legally insufficient. Muth, 676 F.3d at 819. The Ninth Circuit has explicitly held that a “purely legal claim that has nothing to do with factual innocence . . . is not a

1 cognizable claim of 'actual innocence' for the purposes of
2 qualifying to bring a § 2241 petition under the escape hatch."
3 Marrero, 682 F.3d at 1193 (citing with approval cases from other
4 circuits holding that a petitioner "generally cannot assert a
5 cognizable claim of actual innocence of a noncapital sentencing
6 enhancement"); see also id. at 1195 (holding that "the purely legal
7 argument that a petitioner was wrongly classified as a career
8 offender under the Sentencing Guidelines is not cognizable as a
9 claim of actual innocence under the escape hatch").

10
11 Although the Ninth Circuit has noted other circuits'
12 suggestion that "a petitioner may qualify for the escape hatch if
13 he received a sentence for which he was statutorily ineligible,"
14 Marrero v. Ives, 682 F.3d 1190, 1194 (9th Cir. 2012), the Ninth
15 Circuit has not expressly adopted that exception. In Marrero, the
16 court declined to "decide whether to endorse" the exception because
17 the petition in that case did not argue that he was statutorily
18 ineligible for his sentence. Id. at 1195. Regardless, even if
19 the escape hatch could apply to a prisoner's claim that he "received
20 a sentence for which he was statutorily ineligible," Petitioner
21 does not establish such a claim.

22
23 Petitioner claims that a Fourth Circuit decision, United
24 States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc), renders
25 his sentencing enhancement "null and void." (Petition Mem. at 2).
26 In Simmons, the Fourth Circuit held that a prior state conviction
27 qualified as a felony for purposes of a sentencing enhancement
28 under the federal Sentencing Guidelines only if the particular

1 defendant's prior crime of conviction was punishable under state
2 law by a prison term exceeding one year. Simmons, 649 F.3d 241-
3 49.³ Here, Petitioner does not claim that his prior state
4 convictions in Washington and California were not punishable by a
5 prison term of more than one year. He claims, rather, that his
6 prior state convictions do not qualify as felonies, in light of
7 Simmons, "because [Petitioner] was only sentenced to 90 days" for
8 his Washington conviction "and 72 days" for his California
9 conviction. (Petition Mem. at 15). However, Petitioner fails to
10 cite any authority establishing that the sentence actually imposed,
11 rather than the sentence punishable, is dispositive of whether the
12 conviction qualifies as a felony for purposes of the sentencing
13 enhancement imposed in his case. See United States v. Davis, 932
14 F.2d 752, 763 (9th Cir. 1991) (noting the "well established federal
15 rule that a felony is an offense punishable by a maximum term of
16

17 ³ Although Simmons is not binding on this Court, the Ninth
18 Circuit recently cited the case favorably in United States v.
19 Valencia-Mendoza, 912 F.3d 1215, 1223 (9th Cir. 2019). In
20 Valencia-Mendoza, the Ninth Circuit rejected its "earlier
21 precedents that eschewed consideration of mandatory sentencing
22 factors" when determining if a prior state conviction qualified as
23 a felony for purposes of the federal Sentencing Guidelines. Id.
24 at 1224. The court concluded, rather, that "the Supreme Court has
25 held that courts must consider both a crime's statutory elements
26 and sentencing factors when determining whether an offense is
27 'punishable' by a certain term of imprisonment." Id. Under this
28 approach, a prior state conviction qualifies as a felony under the
Guidelines only if the particular defendant could have received a
sentence of more than one year. Id. The Ninth Circuit noted that
this conclusion accorded with decisions in other circuits,
including the Fourth Circuit's holding in Simmons. Id. at 1223.
However, even if the Court construed Petitioner's claim under this
recent Ninth Circuit decision, it still fails because Petitioner
does not show that he could not have received a sentence exceeding
one year for his prior state convictions.

1 imprisonment of more than one year, regardless of the sentence
2 actually imposed").

3
4 Petitioner's failure to assert a claim of actual innocence,
5 by itself, bars the Petition from qualifying for the § 2255 escape
6 hatch. Muth, 676 F.3d at 819 (availability of § 2255 escape hatch
7 foreclosed where petition fails to make plausible showing of actual
8 innocence). Therefore, Petitioner's claim may not be heard under
9 § 2241.

10
11 **2. Petitioner Did Not Lack an Unobstructed Procedural Shot**
12 **to Present His Claim**

13
14 Petitioner's attempt to qualify for the § 2255 savings clause
15 additionally fails because Petitioner has not shown that he did
16 not have "an unobstructed procedural shot" to present his claim.
17 To determine whether a petitioner had an unobstructed procedural
18 shot to pursue his claim, a court asks: "(1) whether the legal
19 basis for Petitioner's claim did not arise until after he had
20 exhausted his direct appeal and first § 2255 motion; and (2) whether
21 the law changed in any way relevant to petitioner's claim after
22 the first § 2255 motion." Harrison, 519 F.3d at 960 (emphasis
23 added). Here, Petitioner bases his claims on United States v.
24 Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc), a decision that
25 the Fourth Circuit issued on August 17, 2011, almost two years
26 before the Southern District of Indiana issued its ruling on
27 Petitioner's first § 2255 motion, on July 29, 2013. See Mendoza
28 v. United States, No. CV 11-018, Dkt. No. 8 (S.D. Ind.); see also

1 2013 WL 3895231, at *5. Petitioner thus could have sought to amend
2 his § 2255 motion to add a claim based on Simmons. He apparently
3 did not do so, nor does he seem to have raised such a claim in any
4 of the several post-conviction motions that he subsequently filed.
5 See, e.g., Mendoza v. United States, No. CV 14-0701, Dkt. No. 2
6 (S.D. Ind. March 13, 2014); Mendoza, No. CR 04-0155, Dkt. No. 2
7 (S.D. Ind. Jan. 5, 2015); id., Dkt. No. 13 (S.D. Ind. July 23,
8 2015).

9
10 The fact that the claim likely would have been denied as
11 successive does not mean that § 2255 was an inadequate or
12 ineffective remedy. As the Ninth Circuit has explained, "it is
13 not enough that the petitioner is presently barred from raising
14 his claim of innocence by motion under § 2255 [because it is
15 successive]. He must never have had the opportunity to raise it
16 by motion." Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir. 2003);
17 see also Castro v. Andrews, 48 F. App'x 655, 656 (9th Cir. 2002)
18 (rejecting contention that district court's denial of motion to
19 amend § 2255 petition rendered that remedy inadequate or
20 ineffective because "a remedy is not inadequate or ineffective on
21 the ground that the sentencing court denied relief") (citing
22 Tripathi v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988)). Indeed,
23 as many courts have observed, "[t]he existence of the statutory
24 bar on second and successive motions cannot mean that § 2255 is
25 'inadequate or ineffective' to test the legality of [a
26 petitioner's] detention within the meaning of the savings clause.
27 If it did, the savings clause would eviscerate the second or
28 successive motions bar" Gilbert v. United States, 640 F.3d

1 1293, 1308 (11th Cir. 2011); see also Prost v. Anderson, 636 F.3d
2 578, 586 (10th Cir. 2011) ("If the rule were otherwise - if the §
3 2255 remedial mechanism could be deemed 'inadequate or ineffective'
4 any time a petitioner is barred from raising a meritorious second
5 or successive challenge to his conviction - subsection (h) would
6 become a nullity, 'a meaningless gesture.'"); United States v.
7 Barrett, 178 F.3d 34, 50 (1st Cir. 1999) ("A petition under § 2255
8 cannot become 'inadequate or ineffective,' thus permitting the use
9 of § 2241, merely because a petitioner cannot meet the AEDPA 'second
10 or successive' requirements. Such a result would make Congress's
11 AEDPA amendment of § 2255 a meaningless gesture.").

12
13 In sum, the Court concludes that the Petition does not qualify
14 for the savings clause of § 2255. Petitioner does not make an
15 actual innocence claim and he has failed to demonstrate that he
16 has not had an unobstructed procedural shot at presenting his
17 claim. Accordingly, the Petition may proceed only pursuant to §
18 2255 and the only court with jurisdiction over this action is the
19 Southern District of Indiana, the sentencing court. See Hernandez,
20 204 F.3d at 865 ("§ 2255 motions must be heard in the sentencing
21 court").

22
23 **B. The Petition Should Be Dismissed Rather Than Transferred**
24 **Because, Construed as a § 2255 Motion, It Is Untimely and**
25 **Successive**

26
27 Because Petitioner does not qualify for the savings clause of
28 § 2255, his challenge must be brought under § 2255 in the

1 jurisdiction of the sentencing court, which is the Southern
2 District of Indiana. See Hernandez, 204 F.3d at 865. The transfer
3 of civil actions among federal courts is governed by 28 U.S.C.
4 § 1631. Transfer is appropriate under § 1631 if three conditions
5 are satisfied: (1) the transferring court lacks jurisdiction;
6 (2) the transferee court could have exercised jurisdiction at the
7 time the action was filed; and (3) the transfer is in the interest
8 of justice. The Ninth Circuit has ruled that § 1631 applies in
9 habeas proceedings. See Cruz-Aguilera v. INS, 245 F.3d 1070, 1074
10 (9th Cir. 2001).

11
12 The Petition, construed as a § 2255 motion, is untimely and
13 successive. Accordingly, this action does not meet the second or
14 third conditions for transfer because the Southern District of
15 Indiana could not have exercised jurisdiction at the time the
16 action was filed and the transfer is not in the interest of justice.

17
18 **1. The Petition Is Untimely**

19
20 Construed as a § 2255 motion, the Petition is patently
21 untimely. A federal prisoner ordinarily has only one year from
22 the date that his conviction becomes final to file a § 2255 motion.
23 See 28 U.S.C. § 2255(f)(1). A case becomes final with "the
24 conclusion of direct review or the expiration of the time for
25 seeking such review." 28 U.S.C. § 2244(d)(1)(A). In this case,
26 Petitioner's conviction became final on January 4, 2010, ninety
27 days after the Seventh Circuit Court of Appeals dismissed his
28 appeal on October 6, 2009. (See Petition at 2); see also Bowen v.

1 Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (the period of direct
2 review for the purposes of AEDPA's limitations period "includes
3 the period within which a petitioner can file a petition for writ
4 of certiorari from the United States Supreme Court"); Sup. Ct. R.
5 13(1) (a petition for a writ of certiorari seeking review of a
6 judgment of a United States court of appeals must be filed within
7 90 days after the entry of judgment).

8
9 Section 2255 also provides that the one-year statute of
10 limitations may begin to run on "the date on which the right
11 asserted was initially recognized by the Supreme Court, if that
12 right has been newly recognized by the Supreme Court and made
13 retroactively applicable to cases on collateral review." 28 U.S.C.
14 § 2255(f)(3). Petitioner, however, does not assert any claim here
15 based on a right that the Supreme Court has recognized in the years
16 since his conviction became final. Accordingly, the statute of
17 limitations expired on January 4, 2011, more than six and a half
18 years before Petitioner filed this action.

19
20 The statute of limitations may be equitably tolled where a
21 petitioner shows "(1) that he has been pursuing his rights
22 diligently, and (2) that some extraordinary circumstance stood in
23 his way." Holland v. Florida, 560 U.S. 631, 645 (2010). Here,
24 however, Petitioner has not established a basis for equitable
25 tolling. Accordingly, the Petition, construed as a § 2255 motion,
26 is untimely and transferring this matter to the sentencing
27 jurisdiction would be futile.

1 **2. The Petition Is Successive**

2

3 Finally, because Petitioner has already filed a § 2255 motion,

4 the Petition, construed as a § 2255 motion, is successive. See,

5 e.g., Mendoza, 2013 WL 3895231, at *5 (denying Petitioner's § 2255

6 motion). "A petitioner is generally limited to one motion under

7 § 2255." United States v. Washington, 653 F.3d 1057, 1059 (9th

8 Cir. 2011). "A prisoner may not bring a second or successive

9 § 2255 motion in district court unless 'a panel of the appropriate

10 court of appeals' certifies that the motion contains: (1) newly

11 discovered evidence that, if proven and viewed in light of the

12 evidence as a whole, would be sufficient to establish by clear and

13 convincing evidence that no reasonable factfinder would have found

14 the movant guilty of the offense; or (2) a new rule of

15 constitutional law, made retroactive to cases on collateral review

16 by the Supreme Court, that was previously unavailable." Harrison,

17 519 F.3d at 955 (quoting 28 U.S.C. § 2255(h)). Accordingly, unless

18 and until Petitioner obtains authorization from the Seventh Circuit

19 to file another § 2255 motion, the Southern District of Indiana

20 lacks jurisdiction to hear his claim.

21

22 The Southern District of Indiana could not have exercised

23 jurisdiction at the time this action was filed. As such,

24 transferring the action would not further the interests of justice

25 and the Court should dismiss the Petition.

26

27

28

V.

RECOMMENDATION

IT IS RECOMMENDED that the District Court issue an Order:
(1) accepting and adopting this Report and Recommendation;
(2) granting Respondent's Motion to Dismiss (Dkt. No. 6); (3)
denying the Petition; and (4) directing that Judgment be entered
dismissing this action without prejudice for lack of jurisdiction.

DATED: June 14, 2019

/s/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court
of Appeals, but may be subject to the right of any party to file
objections as provided in the Local Rules Governing the Duties of
Magistrate Judges and review by the District Judge whose initials
appear in the docket number. No notice of appeal pursuant to the
Federal Rules of Appellate Procedure should be filed until entry
of the judgment of the District Court.